



No. 1172 82

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE UNITED STATES OF AMERICA, APPELLANT

vs.

THE WAYNE PUMP COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT AS TO JURISDICTION



**In the District Court of the United States
for the Northern District of Illinois,
Eastern Division**

No. 32598 (Or.)

UNITED STATES OF AMERICA

v.

THE WAYNE PUMP COMPANY, ET AL.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on February 24, 1942. A petition for appeal was filed on March 26, 1942, and is presented to the District Court herewith, to wit, on the 26th day of March 1942.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by the Act of March 2, 1907, 34 Stat. 1246, as amended (18 U. S. C. § 682), commonly known as the Criminal Appeals Act, and by 28 U. S. C. § 345.

The following decisions sustain the direct appellate jurisdiction of the Supreme Court to review the judgment in this cause on the ground that the judgment is based upon a construction of the statute on which the indictment is founded. *United States v. Patten*, 226 U. S. 525; *United States v. Carter*, 231 U. S. 492; *United States v. Colgate & Co.*, 250 U. S. 300; *United States v. Hastings*, 296 U. S. 188; *United States v. Borden Co.*, 308 U. S. 188; *United States v. Hutcheson*, 312 U. S. 219.

STATUTE INVOLVED

The statute of the United States, the construction of which is involved, is Section 2 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. § 2), commonly known as the Sherman Act, which provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

THE ISSUE, AND THE RULING BELOW

This case is a companion case to *United States v. The Wayne Pump Company, et al.*, No. 32597 (Cr.), D. C., N. D., Ill., and the District Court filed

a single opinion sustaining demurrers in both cases. The only substantial difference between the cases is that the indictment here charges violations of Section 2 of the Sherman Act, whereas the indictment in the companion case is based upon a violation of Section 1 of the Sherman Act.

The instant indictment is in two counts and was returned on January 31, 1941. Count I charges The Wayne Pump Company (Wayne), Gilbert and Barker Manufacturing Company (G & B), Tokheim Oil Tank and Pump Company (Tokheim), all manufacturers of gasoline pumps, and Veeder-Root, Incorporated (Veeder), a manufacturer of gasoline computing mechanisms, together with certain of their officers, with a continuing conspiracy from 1932 to the date of the indictment to monopolize the manufacture and sale of computer pumps. Computer pumps are gasoline pumps embodying a computing mechanism which calculates and registers the quantities and prices of gasoline dispensed. Count II charges the same defendants with a continuing conspiracy from 1932 to the date of the indictment to monopolize the manufacture and sale of computing mechanisms.

The allegations of the indictment may be summarized as follows:

In 1932 Wayne obtained a patent known as the Jauch patent on a computer pump. Wayne then entered into arrangements with Veeder for the latter to develop a commercially feasible computing mechanism, an indispensable element of every

computer pump. Since 1938 Veeder has been the sole manufacturer of computing mechanisms for gasoline pumps.

Wayne, G & B, and Tokheim are the three leading manufacturers of gasoline pumps, selling 56 percent of all computer pumps sold in the United States in 1939. In the same year these three companies, together with eight other manufacturers licensed by Wayne, made all of the computer pumps sold in the United States, constituting 91 percent of the dollar volume of all gasoline pumps sold that year.

In describing the alleged conspiracy to monopolize the manufacture and sale of computer pumps, Count I alleges, *inter alia*, that it was part of the conspiracy that Wayne, G & B, and Tokheim should use the Jauch patent to restrict the manufacture and sale of computer pumps to themselves. It then charges that Wayne was to license G & B and Tokheim under the Jauch patent and acquire control of all patents on computer pumps and computing mechanisms competitive with computer pumps manufactured by Wayne, G & B, and Tokheim or with computing mechanisms manufactured by Veeder. Veeder was to acquire control of all patents on competitive computing mechanisms and convey them, together with any of its own, to Wayne. Wayne was to determine the use of all patents on computer pumps and computing mechanisms owned by G & B and Tokheim and was to

cause owners of patents declared by the United States Patent Office to be in interference with the Jauch patent to file concessions of priority. Wayne, G & B, and Tokheim were to buy computing mechanisms only from Veeder and Veeder was to sell them only to Wayne, G & B, and Tokheim and those approved by them.

Count I further alleges that Wayne was to issue no other licenses under the Jauch patent, except with the consent of G & B and Tokheim and upon terms authorized by them. Wayne was to induce computer pump manufacturers using mechanisms not made by Veeder to accept licenses under the Jauch patent on terms securing to Wayne, G & B, and Tokheim control of the licensees' patents and official personnel. Wayne was also to compel Neptune Meter Company, which, prior to 1938, was engaged in the manufacture and sale of computing mechanisms and was Veeder's sole competitor in that business, to submit its patents to Wayne's control and refrain from selling computing mechanisms except to customers approved by Wayne, G & B, and Tokheim. Wayne, G & B, and Tokheim were to share litigation expenses incurred in enforcing the licenses of licensees other than G & B and Tokheim and were to share royalty payments made by such licensees.

In describing the alleged conspiracy to monopolize the manufacture and sale of computing mechanisms, Count II first alleges that it was a part of

such conspiracy that Wayne, G & B, and Tokheim should use the Jauch patent for the purpose of controlling the manufacture and the purchase of computing mechanisms for use in gasoline pumps. The remaining terms of the conspiracy charged in Count II are the same as those in Count I.

Demurrers to the indictment filed on behalf of all defendants were sustained by the District Court. The court rendered one opinion covering both this case and the companion case in which the defendants herein are charged with fixing prices in violation of Section L of the Sherman Act. The court's reasons for sustaining demurrers to the present indictment are not clear except insofar as the ruling may be said to follow from the conclusions expressed in the opinion directed primarily to the price-fixing indictment. The opinion specifically refers to those allegations in the indictment charging that it was a part of the conspiracy (1) that the defendants use the Jauch patent for the purpose of fixing prices, (2) that they obtain control over all other patents on computer pumps and computing mechanisms and induce other manufacturers to accept licenses under the Jauch patent on terms securing to the defendants control of their prices, and (3) that the defendants Veeder, G & B, and Tokheim acknowledge the validity of the Jauch patent. The court held that these were things which could lawfully be done under the monopoly secured by the Jauch patent. The other allega-

tions, although not specifically mentioned by the court, were disposed of by the following statement in the opinion:

I have read the indictments in their entirety several times, and in the various means, acts and devices whereby the combinations and conspiracies are alleged to have been accomplished, I do not find that defendants are charged with the doing of anything which they did not already have the right, under the patent, to do.

Although there are several statements in the opinion to the effect that certain allegations of the indictment are not clear or are indefinite and uncertain, and to the effect that if the Government charges that the defendants did something beyond the scope of the patent privilege, it is not clearly set out in the indictments, a fair reading of the opinion in its entirety makes plain that the decision rests upon the ground that no violation of the Sherman Act is alleged because the patent privilege exempts the acts charged from the prohibitions of that Act. It seems clear that the court, in stating that certain allegations were insufficient in form, meant that if those allegations were intended to charge anything beyond what the court found to be exempt from the Sherman Act by reason of the patent privilege, the allegations fail to do so in clear and certain terms. This interpretation of the opinion is supported by the fact that all of the decisions relied upon by the court to reach its conclu-

sion relate to the scope of the Sherman Act and the patent law. We believe, therefore, that the decision cannot be said to be based upon the independent ground of indefiniteness, and accordingly that it is subject to review by this Court. *United States v. Borden Co.*, 308 U. S. 188; *United States v. Patten*, 226 U. S. 525; *United States v. Hastings*, 296 U. S. 188.

THE QUESTIONS ARE SUBSTANTIAL

The questions involved are substantial and of public importance. The effect of the decision of the District Court is to hold that a dominant group in an industry may combine and conspire to use a patent owned by one of the conspirators for the purpose of securing a total monopoly of the manufacture and sale of important articles of commerce. We submit that this ruling is contrary to settled decisions holding that a conspiracy entered into for the purpose of suppressing competition in an article is none the less illegal because one of the parties holds a patent on the article and could, acting alone and voluntarily, have lawfully imposed the same restraints on competition (*Interstate Circuit, Inc. v. United States*, 306 U. S. 208, 228-230), and that a combination between owners of different patents, formed for the purpose of effecting a monopoly or fixing prices, is violative of the Sherman Act. *National Harrow Co. v. Hench*, 83 Fed. 36 (C. C. A. 3); *Blount Mfg. Co. v. Yale & Towne Mfg. Co.*, 166 Fed. 555 (C. C. D. Mass.); see

Standard Oil Co. v. United States, 283 U. S. 163, 174-175; *Straus v. American Publishers' Ass'n*, 231 U. S. 222.

A complete review of the decision of the District Court is highly desirable. The United States has appealed from the ruling in the companion case to this (No. 32597), which was decided in the same opinion, and a full review cannot be had unless both cases are considered. In any event, this case presents questions of substance which warrant review by the Supreme Court.

Respectfully submitted.

/s/ CHARLES FAHY,
Charles Fahy,

Solicitor General.

(Clerk's Note.—The opinion of the District Court is printed as an appendix to the Jurisdictional Statement in the case of *The United States of America v. Wayne Pump Company et al.*, No. 1171, October Term, 1941.)